BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY DOUGLAS	)	
Claimant	)	
	)	
VS.	)	
	)	
AD ASTRA INFO. SYSTEMS, LLC.	)	
Respondent	)	Docket No. **1,034,074**
	)	
AND	)	
	)	
HARTFORD INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the June 6, 2008 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on September 3, 2008.

APPEARANCES

Daniel L. Smith of Overland Park, Kansas, appeared for the claimant. Tracy M. Vetter of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties agreed that if this claim is found compensable, neither disputes the ALJ's Award which finds a 15 percent permanent partial functional disability. And the parties further agreed that the Award compensation paragraph contains a typographical error and should read claimant is entitled to compensation for a 15 percent functional impairment instead of work disability as only a functional impairment was claimed and awarded.

ISSUES

The claimant was injured racing a go-cart at an off premises event conducted by respondent for its employees during regular work hours. K.S.A. 44-508(f) provides that

injuries occurring during social or recreational events where the employee is not required to attend are not compensable under the Workers Compensation Act. Respondent denied the accident was compensable because claimant was engaged in a recreational or social event and was neither required to attend the event nor performing tasks related to his normal job duties.

The Administrative Law Judge (ALJ) found the claimant's accidental injury was compensable and awarded him benefits for a 15 percent whole person functional impairment.

Respondent requests review of whether claimant's accidental injury arose out of and in the course of employment with respondent. Specifically, whether K.S.A. 44-508(f) bars this claim. Respondent again argues the event was a social/recreational activity and that claimant was neither required to attend the event nor performing tasks related to his normal job duties. Respondent requests the Board to deny compensation and reverse the ALJ's Award.

Claimant argues that he felt his attendance at the event was expected and the event was a team building exercise to boost morale as well as energize the workers. Claimant further argues he was assigned to a team for the go-cart race by respondent's co-owner and encouraged to go fast to win a prize. Accordingly, claimant also argues the activity does not fall within the K.S.A. 44-508(f) exception for recreational and social events and requests the Board to affirm the ALJ's Award.

The sole issue for Board determination is whether claimant suffered accidental injury arising out of and in the course of his employment. Specifically, whether under the facts of this claim, K.S.A. 44-508(f) bars an award of compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was hired as a support analyst by respondent. His job was to answer questions regarding respondent's products between the hours of 8 a.m. and 5 p.m., Monday through Friday.

On Friday, November 3, 2006, claimant received an email at work regarding an event that was taking place in Olathe. He testified the event was company wide and that it was a "team builder." Claimant was given a choice of either going to the event or remaining at work but he said that he felt pressured to attend the event.

On the afternoon of November 3, 2006, claimant went to the location where the event was to be held. When he arrived at about 12:30 p.m., he was greeted by Mrs. Jackie Shaver, respondent's co-owner. Mrs. Shaver directed him to a private meeting room. Food had been prepared exclusively for claimant's co-workers. While the food was being served, claimant and his co-workers were divided into teams by Mrs. Shaver. Claimant was paired with Cindy Sullivan as teammates. At the beginning of the meeting, Mr. Shaver, respondent's co-owner, discussed the release of a new program which claimant considered a pep talk.

Claimant testified that Mr. and Mrs. Shaver participated in this event and that he recalled that Mr. Shaver participated in the go-cart racing. For safety measures, an individual from Sadler's, the facility where the event was held, showed respondent's employees how to put on their helmets. Claimant and his co-workers were required to sign a release form. This form released the Sadler's go-cart facility from any liability or responsibility for accidental injury.

Claimant testified that the teams were being encouraged to go as fast as they could because there were going to be prizes for those with the fastest time. Claimant testified:

> Q. Was the event, from your perspective, intended to energize the sales force in order to boost customer service and customer sales?
>
> A. Yes, I felt like it was meant to boost morale and boost sales to kind of energize the company.[1]

Claimant testified that while they were racing the track had been reserved exclusively for the use of respondent's employees. Claimant testified he was cutting around one of the corners and when he swerved to avoid a stopped go-cart he hit a tire wall. Claimant was ejected from the go-cart onto his right side. Since he was in pain he did not complete the race but he thought the pain would go away. He stayed until the event was over and then went straight home.

Claimant testified the pain continued to worsen so he sought medical treatment at St. Luke's emergency room. He was prescribed some pain medication and x-rays were taken. Over the next couple of weeks, claimant's condition progressively worsened so he returned to St. Luke's emergency room. X-rays were taken again which revealed claimant's right lung was filling up with fluid. Claimant's family physician referred him to a thoracic surgeon, Dr. Kevin L. Mayor, who performed surgery on November 30, 2006, to remove the fluid from his lung. Claimant also had suffered a rib fracture. Claimant was off work for a few weeks following his surgery and received his regular pay.

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[1] R.H. Trans. at 16-17.

Claimant agreed that the go-cart racing facility was not his normal work place and go-cart racing was not a part of his normal job duties. His duties included answering customer's questions regarding the new product as well as solving problems. He sat at a computer and used the telephone all day long.

Claimant testified the activities at the event occurred during the work day and he received his normal pay for that afternoon. All of the food and rental fees were paid by respondent.

Jackie Shaver, co-owner of respondent, testified that the event was a "thank you" to their employees for the extra work they performed for a recently held convention for respondent's customers. She further testified that attendance at the event was not mandatory but she wanted people to go to the event. But those individuals that did not participate were not reprimanded and simply stayed at the office and worked. Mrs. Shaver agreed that the event might encourage employees to renew their efforts on behalf of respondent in providing customer service or sales. Respondent deducted the expenses for the event on it's taxes as a necessary business expense.

Tom Shaver, co-owner of respondent, testified that he gave a thank you speech to all of those in attendance at the event. He testified:

> Q. Did you intend for that event to be a business oriented purpose at the event?
>
> A. Not other than thanking our employees for working hard at the user's conference.[2]

He further testified that from his perspective the event was not mandatory and it was supposed to be fun. "It was simply a thank you, fun event." Mr. Shaver agreed the event was intended to create good feelings among the employees towards respondent. Mr. Shaver further agreed that only respondent's employees were on the racetrack during the racing. Mr. Shaver was aware of claimant's accident on the same day that it occurred.

Stacey White, respondent's regional account manager, testified she received an invitation by email to attend the event. She indicated that it was to be a fun event for everyone due to all of their hard work at the user's conference.

> Q. Was it your understanding that was suppose to be like a thank you of some sort?
>
> A. In my opinion, yes, it was a thank you for working so hard at the user's conference. They had pizza, whatever, was there for us to eat. I think they had pizza and maybe barbecue, I can't remember. We do barbecue every Thursday,

[2] T. Shaver Depo. at 4.

> barbecues, and they feed us lunch every Thursday. So, Tom got up and talked a little bit about the company and said thank you for working so hard and this should be fun.[3]

Ms. White agreed that team building might have also been the idea for the event, but that was never said.

Joy Hoffman, respondent's administrative assistant, testified that the event was planned by management to be a reward for all of the hard work that had been required at the user's conference. Ms. Hoffman testified:

> Q. Were you asked to send an E-mail to the employees?
>
> A. There was an invitation that went to the sales force inviting everyone to do that. I probably put together that invitation.
>
> Q. Were you ever told by anybody, management, owners, that the E-mail or information in the invitation was to include a requirement that employees appear? In other words, stating this is mandatory to appear or you are required to appear?
>
> A. No, I was not.
>
> Q. Was it your understanding just as one of the employees there that it was a mandatory or a required event?
>
> A. No.[4]

But Ms. Hoffman agreed that she felt a little bit of peer pressure to attend the event. And it was her perception that it was a team building event.

The Workers Compensation Act expressly states that it should be liberally construed to bring employers and employees within its provisions. But once it is determined the parties are within the Act, the Act's provisions must be applied impartially.

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[5]

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[3] White Depo. at 7.

[4] Hoffman Depo. at 5.

[5] K.S.A. 2006 Supp. 44-501(g).

In addition, the Act specifically provides that injuries to employees while engaged in social or recreational activities do not arise out of and in the course of a worker's employment.

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.[6]

But the Act does not define what a recreational or social event might be. Indeed, under some definitions work is a social activity and a recreational activity is something done *after* work or only away from work. Accordingly, it is unclear whether the legislature intended to exclude from the Act social activity that occurs at work during normal work hours or, instead, whether the intent was to exclude those recreational and social activities that occur outside work hours and away from the workplace such as a holiday party or the company softball game.

2 *Larson's Workers' Compensation Law*, § 22.01 (2007) at 22-2, lists three factors to determine whether recreational and social activities fall within the course of an employee's employment.

One factor is whether the employer expressly or impliedly requires participation in the activity or brings the activity within the orbit of employment by making the activity part of the service of employment.

In this instance, the accident occurred while claimant was involved in an employer sponsored go-cart race which was held during regular work hours. Claimant felt that participation was required and Ms. Hoffman agreed that she also felt some pressure to attend. When claimant arrived at the location where the event was held he was directed to a room reserved for respondent's employees and was assigned to a team by the respondent's co-owner. Such assignment impliedly requires participation in the event. Another factor which implies that participation is required is that employees were offered the option to either attend the event or remain at work. That option would motivate most employees to attend the event rather than stay at work. And Ms. Shaver agreed that she wanted employees to attend the event.

A second factor listed by *Larson's* in determining whether a recreational activity is within the course of employment is whether the employer derives a benefit from the employee's participation beyond the benefits of the employee's health and morale. In this

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[6] K.S.A. 2007 Supp. 44-508(f).

case the activities were promoted by respondent as a reward for work done by its employees at a conference that had been held for respondent's clients. But respondent's owner did give a brief speech regarding a new product and assignment of the attendees to teams for the racing certainly implies a team building activity. And if the intent was solely to reward the employees for work they had performed at the conference it seems the more traditional cash bonuses or time off from work could have been utilized.

A final factor in determining whether recreational activities are within the course of employment is whether they occur on the employer's premises during a lunch or recreation period as a regular incident of the employment. According to *Larson's*, "recreational injuries during the noon hour on the premises have been held compensable in the majority of cases."[7] In this instance, although claimant was not on respondent's premises he was on premises respondent had reserved exclusively for its employees for lunch as well as the go-cart racing activities. Moreover, claimant was being paid when the accident occurred. Although this particular event was not a regular incident of employment, the respondent did routinely, one day a week, provide lunch for its employees just as it did at this event.

In *Hizey*[8] it was determined the claimant's injury arose out of and in the course of her employment rather than during a recreational or social event, where claimant was injured while participating in a voluntary dance contest which employer designed to energize and motivate employees, claimant was paid while participating in the contest, the contest occurred during regular working hours, and the contest took place on employer's premises.

This claim is similar to Hizey because claimant was injured participating at an event which he felt he was required to attend as part of an overall team building event. Although the event did not occur on respondent's premises, nonetheless the room where the respondent's employees met and ate was reserved for only respondent's employees and the race track was reserved for only respondent's employees when the go-cart racing event occurred. Moreover, claimant received his regular pay while attending the event.

There was, at a minimum, an implied requirement or some duty to attend the event, and claimant was assigned to a team which indicates that team building was a component of the event. Moreover he was encouraged to drive fast in the race. He was paid while attending the event at a location reserved for respondent's employees. Understanding that work often entails social interaction and that the Workers Compensation Act was intended to be liberally construed to bring employers and employees within its provisions, the Board finds claimant's accident did not occur during a recreational or social event as contemplated by K.S.A. 2007 Supp. 44-508(f).

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[7] 2 *Larson's Workers' Compensation Law*, § 22.03 (2005) at 22-6.

[8] Hizey v. MCI, _____ Kan. App. 2d _____, 181 P.3d 583 (2008).

The Board finds claimant is entitled to compensation for his injuries suffered on November 3, 2006. As previously noted the parties agreed that claimant suffered a 15 percent whole person functional impairment. As further noted the ALJ's award is modified to reflect claimant suffered a 15 percent whole person functional impairment as a result of his accidental injuries suffered on November 3, 2006[9] and affirmed in all other respects.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated June 6, 2008, is corrected to reflect that claimant suffered a 15 percent whole person functional impairment as a result of his accidental injuries on November 3, 2006, and affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of October 2008.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Tracy M. Vetter, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[9] The ALJ's compensation paragraph also contains a typographical error listing the date of accident as November 4, 2006 instead of November 3, 2006.